Subcommittee on Duties of Elected Officials
Report on the City Attorney's Office by James Ingram

The History of the San Diego City Attorney's Office

In 1889, San Diego established its first City Attorney's office, and prescribed that its head be an appointed official.[1] The office emerged as a part of the City's first "home rule" Charter. On December 5, 1888, San Diego's voters had elected a Board of Freeholders to draft such a Charter. The Freeholders completed the document on January 10, 1889, the voters ratified it on March 2, 1889, and the City "constitution" became effective when the state legislature approved it two weeks later (although most of the organic law did not take effect until the first Monday in May 1889). The 1889 Charter established a CEO-Mayor, a bicameral legislature, an elected Treasurer, an Auditor appointed by the Mayor with confirmation by the Common Council's lower house, and a City Attorney appointed by the Common Council for a two-year term.

In 1905, the City's voters amended the Charter to move to a unicameral legislature. Four years later, the public scrapped the Mayor-Council form of government and moved to the commission plan, the charter reform that was then the latest fad. In 1915, the City repealed the commission form of government, and moved back to the Mayor-Council system. In 1929, a group of reformers tried to persuade the voters to follow the latest trend, toward Council-Manager government, but the electorate balked at this proposal. Although some have attributed the defeat of the 1929 Charter to its provisions for an appointed City Attorney, the fact is that the harbor-related Charter language the 1929 Board of Freeholders proposed was the aspect voters found most troubling.

Former San Diego City Attorney and Judge Shelley J. Higgins, who worked for both the 1929 and 1931 Freeholders, recorded these events: "More and more sentiment developed for adoption of a new charter modeled along competent lines to give us a city manager form of administration. This sentiment crystallized in 1929 with the election of a board of freeholders to draw up such a charter. The freeholders did draw up a city manager-type charter. But the powers they proposed to confer upon the manager excited fierce opposition. For one, the 1929 proposal made nearly a clean sweep of placing city departments under the manager, the list including even the traditionally independent harbor department. Friends of the existing harbor program opposed the new charter heatedly, on the ground that for 30 years the harbor had been developing into a splendid port simply because it was under the direction of commissioners and that such service could not be counted on from a salaried professional manager."[2]

In 1931, the voters approved the new Charter proposed by yet another elected Board of Freeholders. Like the unsuccessful 1929 proposal, the 1931 Charter provided for a Council-Manager form of government. One of the other innovations in the 1931 Charter was that it changed the City Attorney, which had been appointed

[1] Technically, San Diego did have an elected City Attorney under the 1850 charter that the State of California drafted for the City, but the office was ended when the City went bankrupt in 1852, and the state legislature dissolved the government.

[2] Shelley J. Higgins, as told to Richard Mansfield, *This Fantastic City: San Diego; Official City Policy History, Combining Factual Backgrounds with Evolution and Course of Municipal History, Lightened and Enlivened by Illustrations and Incidents Reflective and Typical of the Times*, San Diego: City of San Diego, 1956, p. 259.

from 1889-1929, into an elective officer. Some have implied that this alteration accounts for the ratification of the 1931 Charter. In fact, Shelley Higgins, who worked in the City Attorney's office off and on for his whole career from 1914 until his death in 1956, reported that other issues, such as the harbor, were decisive.[3] Higgins noted in his autobiography (which was such an important document that the City Council published it as San Diego's "Official City Policy History") that the independent commissions governing "the harbor, civil service, parks, and planning" were key to the 1931 Charter's victory.[4] As one of the quotations in the Aguirre report demonstrates, the San Diego Union Tribune even argued that making the City Attorney an elected officer was unwise.[5]

The City Attorney's Office won the most important cases in San Diego's history when the office was managed by an appointee. For instance, Deputy, Assistant, and official City Attorney Shelley Higgins won the "paramount rights" water cases that rescued the City's water rights from private companies and other cities. The six cases on water rights that Higgins won up to 1930 established the City's paramount right to the San Diego River, and the right to build the El Capitan Dam and Pipeline.[6] Higgins was so good a municipal attorney that he was the person who realized that the way to allow San Diego to expand to the south and enhance both its water and harbor interests was to annex an underwater shoestring of land down the middle of the San Diego Bay. That is why it is legal for the southern portion of San Diego to be part of the City even though it appears not to be physically connected to the rest of the City (California law mandates that in order to annex an area into a city, that area must be physically connected to the city). Higgins and the other members of the City Attorney staff won the cases that made the City as successful as it is, even though the office was led by an appointee.

In establishing an elected City Attorney, San Diego's 1931 Charter followed the Los Angeles model. L.A. had elected its City Attorney ever since 1850, and was one of

---

[3] On April 26, 2005, the City Attorney's Office released a "Report on the Role of the City Attorney as Independent Representative of the People of San Diego" (hereinafter, "Aguirre Report"). The Aguirre Report incorrectly indicates that Higgins actually favored the 1929 Charter's provisions for an appointed City Attorney. In fact, Higgins did not approve of the way the 1929 Charter dealt with that issue. He and the other counselors who worked with the 1929 Board of Freeholders thought that it was problematic to make the City Attorney an appointee of the City Manager rather than an appointee of the Council. Compare Higgins, p. 260 to Aguirre Report, p. 10.

[4] See Higgins, p. 261, which also indicates that it was important that the 1931 Charter did not subject the City Attorney, City Clerk, Auditor and Comptroller and Civil Service to the administrative authority of the City Manager.

[5] See p. 15 of the Aguirre Report, which quotes the newspaper article: "The freeholders have departed from the accepted rules even more widely-and, in our opinion, less wisely-in providing that the city attorney shall be an elective officer."

[6] Higgins argued these Paramount Rights water cases before the California Supreme Court. The two most important cases were: *The City of San Diego* (a Municipal Corporation)*, Plaintiff and Appellant, v. Cuyamaca Water Company* (a Corporation) *Et Al., Defendants and Appellants; The City of El Cajon* (a Municipal Corporation) *Et Al., Interveners and Appellants*, 209 Cal. 105, March 21, 1930; *The City of San Diego* (a Municipal Corporation)*, Respondent, v. The Cuyamaca Water Company* (a Corporation) *Et Al., Defendants and Appellants; La Mesa Lemon Grove and Spring Valley Irrigation District Et Al., Interveners and Appellants*, 209 Cal. 152, March 21, 1930.

the few cities in the state that elected this officer at the time.[7] However, one of the differences in the way that San Diego handled the City Attorney's office, as compared to Los Angeles, is that L.A. specified that the City Council would control litigation while San Diego gave the officer a free hand. When Los Angeles amended its Charter in 1999, many of the important changes dealt with the issue of who should control litigation, hold settlement authority and be able to employ outside legal counsel. In each of these areas, the City of Los Angeles placed greater restrictions upon its elected City Attorney.

Since 1931, San Diego's electorate has used charter amendments to make many changes to the office of the City Attorney. In 1943, the voters changed the Charter to provide that if there were a vacancy in the City Attorney's office, the Council could appoint someone to fill it until the next regular municipal election. In 1947, the voters slightly clarified the provisions for appointing someone to fill a vacancy in the office, and changed the Charter to allow the Council to set the City Attorney's salary (it was previously fixed to remain permanently at $6,500 per year, and this instead became the minimum). In 1959, the voters changed the Charter to remove the provision that the City Attorney's salary was to be payable on a semi-monthly basis. In 1963, the voters changed the Charter to provide that the Mayor and City Attorney would be selected at different elections, to clarify the officer's authority to apply for an injunction on behalf of the City, to raise the minimum salary of the City Attorney to $15,000, and to provide that anyone elected to fill a vacancy in the office at the next regular municipal election would only serve the remainder of the unexpired term (to keep the Mayor and City Attorney elections on different cycles). In 1975, the voters changed the Charter to elect the City Attorney in the same election as the Mayor, and in even- rather than odd-numbered years (starting in 1984). In 1992, the voters changed the Charter to limit the City Attorney to two four-year terms. In 2004, the voters changed the Charter to provide that the Ethics Commission would "have its own legal counsel, independent of the City Attorney."[8] In sum, the voters have changed the City Attorney's office ten times through charter amendments approved at seven different elections over the past 76 years.

It is difficult to argue that moving to an elected City Attorney improved the City's legal representation. As indicated above, the appointed City Attorneys won the water cases, and even assisted in putting together the City's water plan, that made it possible for the City to grow to its present size. More recently, some of those elected to the office appear not to have been as helpful to the City. For example, in 2004, San Diego conducted an election which cohered with the City's Municipal Code but violated its Charter. The San Diego Municipal Code had been amended in 1986, because in 1985 the California Supreme Court had issued the *Canaan v. Abdelnour*

---

[7] In 1850, California's legislature drafted a charter for L.A., and under that document the City Attorney was elected. When L.A. enacted its 1889 home rule charter, it continued to elect the officer, and maintained this practice under new charters passed by that city in 1924 and 1999.

[8] The historical information provided in this paragraph was assembled through a search of the California Statutes for the 1931, 1943, 1947, 1959, 1963, 1975 and 1992 legislative sessions. Staff examined those particular sessions because the Charter lists these dates as when amendments were made to section 40 (although sometimes these are not reliable; for example, according to section 40's annotations, the November 2, 2004 amendment took effect on April 1, 2004; this is absolutely impossible, and appears to be an April Fools' Day joke in the City's Charter). All new charters and charter amendments must be filed with the State of California, and this is thus the most reliable source for tracking charter changes. The nature of the 2004 amendment was obvious, based on a comparison of the 1992 language with the present language, although the 2004 Sample Ballot also contains the information.

decision, ruling that the City could not prohibit write-in candidates in run-off elections (40 Cal 3d 703 (1985)). Despite changing the Municipal Code, the City failed to change its Charter provisions governing elections. As a result, the City's own Municipal Code was inconsistent with the City's Charter for the next 18 years.[9] If a city changes the Municipal Code which is supposed to implement its Charter in a way which is inconsistent with that Charter, and then fails to alter the Charter, then of course the City's laws will contradict the constitution that authorizes its laws. How is it that the voters were never asked to ballot on a charter change to address the unacceptability of the City's elections process? City Attorney's offices are usually responsible for ensuring that a city's municipal code does not violate its own charter. To allow a conflict to exist merely because of a ruling that state law trumps that of the city risks exactly the situation that occurred in the 2004 election.

The way that the process of court action and charter amendment is supposed to work is illustrated by the City's move to district-based general elections in 1988.[10] In the wake of *Gomez v. Watsonville*, the City of San Diego apparently feared that its system for electing the City Council would not survive a Voting Rights Act challenge.[11] San Diego's election system required that the district's voters narrow the field down to two candidates in the primary; the City at large would then elect one of them to office in the run-off. Since the 1975 extensions of the Voting Rights Act, the courts have often ruled that at-large election systems cause minority vote dilution, and consequently required cities to overhaul them. Based on the possibility that San Diego's election system might be deemed unacceptable, and concerns that it was fundamentally unfair to diverse communities, the City acted to change it. At the next election, the ballot included a charter amendment, and in approving it the public established a pure district-based election system for the Council. Why wasn't the *Canaan v. Abdelnour* case handled in the same manner? After all, City Attorney John Witt was an experienced elected official. With 36 years of service in that capacity, Witt still holds the record for serving the longest as an elected San Diego official. How did the City fail to do the right thing on the write-in elections case?

Comparative Examination of City Attorney's Office

San Diego Charter section 40 identifies the City Attorney as the City's "chief legal adviser". Such language begs comparison to the United States Attorney General, an office established by President George Washington to act as the new nation's chief legal adviser. The Attorney General is not elected, but is rather an appointee serving at the pleasure of the President. When President Washington named the first Cabinet in 1789, its membership included only the secretaries of State, Treasury and War, as well as the Attorney General. Pursuant to Article II of the United States

[9] The California Supreme Court seems to have changed its position on this issue, because in the 2002 case of *Edelstein v. City and County of San Francisco* (29 Cal. 4th 164) the court apparently restored to the City the right to govern its elections as a municipal affair. At this point, the conflict between the City's Charter and Municipal Code became a major problem because the Charter was no longer preempted in this area by state law. See the City Attorney's January 21, 2005 Memorandum of Law on the "Applicability of California State Law Requiring Marking of Oval Next to a Write-In Candidate's Name to the City of San Diego's November 2, 2004 Mayoral Election."

[10] Staff research into this area indicates that prior to his election as City Attorney, Michael Aguirre participated in bringing about San Diego's move to our present system of electing Council members through his representation of the Chicano Federation.

[11] *Gomez v. Watsonville*, 863 F.2d 1407, July 27, 1988.

Constitution, the President appointed these officers, subject to the consent of the U.S. Senate. The 1789 Judiciary Act spelled out some of the duties of the Attorney General, but it was not until 1870 that the creation of the Department of Justice placed a Cabinet-level department under the Attorney General's control.

The appointment of the Attorney General is relevant here because it is arguably the chief legal officer for the nation. In selecting that officer, the United States has never turned to elections. Likewise, appointment is the method by which most cities select their chief legal officer, often called the Corporation Counsel. Only a few cities have not followed the federal model, and have diverged by electing their City Attorney. San Diego is one of a small number of cities with elected City Attorneys rather than appointed legal counsel.

It is not surprising that the City of San Diego elects its City Attorney because San Diego is a California city. The State of California has many governmental attorneys who are elected rather than appointed. For example, the state elects the Attorney General rather than making that officer a gubernatorial appointee confirmed by the state legislature. In fact, California elects more of its executive branch officers than do most of the States in the Union. There are 8 executive officers elected statewide in California—the Governor, Lieutenant Governor, Attorney General, Controller, Treasurer, Superintendent of Public Instruction, Secretary of State, Insurance Commissioner (and some argue that the state's "plural executive" is actually 12 members, counting the four elected members of the Board of Equalization).

California has also demonstrated a preference for electing many non-legislative officers at the local level. For example, California counties elect their Sheriffs, District Attorneys and Assessors. California cities have elected even larger numbers of municipal officers outside the legislative branch. For instance, when Los Angeles voters ratified the first home rule charter in California (and the second in the nation), they provided for nine officers elected citywide—the Mayor, City Clerk, City Attorney, City Treasurer, City Auditor, City Tax and License Collector, City Engineer, Street Superintendent, and City Assessor (not to mention the two elected police judges and the Board of Education).

The election of the City Attorney seems to be a uniquely Californian innovation. In its 1998 study of City Attorneys, the Los Angeles Charter Reform Commission found that "no major U.S. city located outside California elects its City Attorney...." However, the commission did find that "four out of the five largest California cities have an elected City Attorney...." [12] Yet even in California, it is not common municipal practice to elect City Attorneys. Only 11 of the state's 478 cities elect their City Attorneys. They are Albany, Compton, Huntington Beach, Long Beach, Los Angeles, Oakland, Redondo Beach, San Bernardino, San Diego, San Francisco and San Rafael.[13] Six of the cities that do elect their City Attorneys are large by California's standards, but the other five are not.

San Diego deviates from standard national practice in more than merely electing the City Attorney. In its 1998 study of City Attorneys, the Elected Los Angeles Charter Reform Commission found that:

---

[12] Both quotes are from Los Angeles City, Charter Reform Commission, *Reforming the Los Angeles City Charter: Road to Decision*, 1997, Page A 3.

[13] Oakland became the 11th city with an elected City Attorney in 2000. See the California League of Cities for this information: www.cacities.org.

> In the vast majority of cities in the United States, the attorney's primary role is to act as 'chief legal advisor' to the Mayor and Council and city departments. Unless the Charter prescribes prosecutorial power to the city attorney, prosecutions are handled by the District Attorney of the County. Litigation is usually under the supervision of the Mayor and Council. However, in those other (smaller) cities, the Mayor and Council are one governing body with city departments reporting either to the Mayor and Council as a body or through the City Manager. Many cities contract with private municipal law firms when litigation arises.
>
> The model for New York, the only U.S. city larger than Los Angeles, was discussed by the Committee. The corporate counsel for New York reports to the Mayor and is responsible for citywide matters of litigation. Each department has its own counsel. Each elected official has staff counsel. There are no elected attorneys. All prosecutions are handled by the District Attorney.
>
> The legal functions of Los Angeles County are handled the same as they are in all other counties in California. The elected District Attorney handles prosecutions. The appointed County Counsel provides legal advice and supervises litigation. County Counsel reports to the Board of Supervisors.[14]

Both the elected and the appointed Los Angeles charter reform commissions engaged in a serious discussion of the election of the City Attorney and the authorization of that officer to handle both civil and criminal litigation. In their research, both commissions found that Los Angeles was quite unlike most United States cities. San Diego is one of the very few cities whose City Attorney's office resembles the Los Angeles model.

Potential Problems with the Election of City Attorneys

A recent law review article examined San Diego's ongoing pension controversy. In her essay on "Solutions to the City Attorney's Charter-Imposed Conflict of Interest Problem," Heather Kimmel used San Diego as a case study:

"The San Diego city attorney is bound by San Diego's charter to represent and advise the city and all of its departments and officers, including the city council, in all legal matters. The city attorney announced that he would open his own investigation into the city employees' fraudulent accounting and withholding of information from financial documents, independent of an investigation authorized by the city council, which hired an outside law firm to do the work. He also announced that he would reopen the public integrity unit of the city attorney's office, which is responsible for prosecuting city employees for misdemeanors of fraud, waste, and abuse of city resources. According to the charter, the city attorney represents, in their official capacities, the top officials implicated by the federal investigations, and also represents those city government officials who wish to expose and correct the

[14] The Elected Los Angeles Charter Reform Commission, Committee on Improving the Structure of Government, *Report on Office Functions of the City Attorney*, Los Angeles, June 8, 1998, p. 2.

wrongdoing. Both clients have vastly different interests. For whom should the city attorney advocate?"[15]

The California State Bar's Rules of Professional Conduct are very clear on such as issues as attorney-client privilege, and how an attorney is to act when representing a client that is an organization. But those rules become very difficult to apply when it comes to elected City Attorneys who are responsible to the City and must provide its officials with legal counsel. As Kimmel states, "City charters often require the city attorney and her staff of assistant city attorneys to provide legal advice and representation to the city council, the mayor, and city departments and agencies. When these government bodies have different goals for the city as a whole, a conflict of interest may occur for the city attorney. An attorney in private practice can avoid this conflict of interest situation by declining to represent a potential client if the representation would result in a conflict of interest. The city attorney usually has no such option."[16]

All attorneys must act under the Rules of Professional Conduct, and private corporations are advised by counsel, so why would the position of a government attorney be difficult. Kimmel explains: "Identifying the client of the government lawyer is a threshold issue for determining whether a conflict of interest exists. Like a private corporation, a government client is an organization, and the lawyer represents the interests of the organization as a whole. Because an organization cannot speak for itself, the lawyer takes direction from the organization's authorized representatives. A private corporation is usually easily identifiable as a discrete entity with certain constituents who are always authorized to speak for the corporation, making it fairly simple for an attorney hired by a corporation to identify her client and those individuals responsible for advancing its interests. Because of the many levels of government and changing circumstances of representation, it is often more difficult to identify the government lawyer's client with certainty. For example, the client of a federal government agency lawyer could be the federal government as a whole, the executive branch of government, the President of the United States, the public, or the agency for which the lawyer works."[17]

In examining this issue, Kimmel found that there are three models for dealing with this dilemma. The first holds that the public interest is the client, but this is problematic: "Saying that the government attorney's client is the public interest is easy; it even sounds right—of course the government exists for the public. Though it may sound superficially reasonable, many legal commentators have rejected as unworkable the once-popular idea that the government attorney serves the public interest, because the public interest is not universally defined. The government lawyer's supervisor, the lawyer, and the elected officials involved may all have conflicting ideas about what is in the public interest."[18] This becomes even more tangled, of course, when the government's lawyer is an elected official.

The second model would be to regard the whole government as the client, but this is also untenable: "Identifying the client as the whole government, however, is not useful because it does not identify from whom a government attorney should take,

---

[15] The article is in the *Ohio State Law Journal*, Volume 66, pp. 1075-1104, 2005. This passage is on p. 1076.
[16] Kimmel, p. 1075.
[17] Kimmel, p. 1079.
[18] Kimmel, p. 1080.

or seek, direction and guidance. The legislative, executive, and judicial government branches frequently have competing interests. This is true at the federal, state, and local levels. The government lawyer must identify a single government position to advance, or at least non-conflicting positions, to represent the entire government. That is an impossible task. Ultimately, this model shares the problems of the public interest model discussed above, in that the attorney cannot know what position to advocate in the case of conflicting positions taken by individuals or branches within the government as a whole."[19] Again, this dilemma is made all the more complex when the government lawyer is an elected official.

The third model is for the attorney to define the client as the government agency that employs him or her: "The model currently favored identifies the government attorney's client as the government attorney's employing agency, narrowing down the client's identity. The Restatement of the Law Governing Lawyers takes this position: "The preferable approach . . . is to regard the respective agencies as the clients and to regard the lawyers working for the agencies as subject to the direction of those officers authorized to act in the matter involved in the representation." Representing a single agency lessens the possibility of conflicts of interests. Like a corporation, the actual client is the agency, but the interests of the agency are determined by the agency officer or department head who has decision-making authority. The agency officer lays out the agency's policy and position, giving the attorney clear guidance as to which interests to advance. If a department head's policy interests conflict with the agency officer's interests within an agency, the attorney is obligated to advance the agency officer's interests. Thus, the agency-as-client model is workable for the government attorney because it narrows the client down to a discrete unit that operates under one policy-making authority."[20] In the case of an elected City Attorney, this is not a solution because the City Attorney heads the government agency that employs him or her.

Kimmel indicates later in the article that none of these models adequately addresses the issue of "whose interests the city attorney should advance in the case of a conflict of interest between her clients who are designated by the city charter."[21] The issue identified by Kimmel remains a problem at present: "The law of ethics for city attorneys in conflict of interest situations is fundamentally unclear. City attorney conflicts of interest have recently been reported in the media with some frequency. Because of the prevalence of such conflicts and the degree of disruption they cause, the problem must be addressed. Although the first requirement in determining whether there is a conflict of interest is to 'clearly identify the client,' no useful model exists that takes account of the city attorney's charter-imposed duty to represent the mayor and the city council at the same time. Considering the city attorney's ethical obligations in the context of the method of her selection and the scope of her representation is helpful in minimizing some types of conflicts of interest, but inadequately addresses other types. Because of this uncertainty, solutions that avoid conflicts of interest need to be explored."[22]

Kimmel contends that a solution would be to give the City Council separate representation: "Providing the city council with its own permanent representation via a charter amendment both clearly identifies the client and at the same time

[19] Kimmel, p. 1082.
[20] Kimmel, pp. 1082-1083.
[21] Kimmel, p. 1083.
[22] Kimmel, p. 1104.

removes the possibility of conflicts of interest when the mayor's interests are different from the council's interests. This is the best solution and one that can be implemented in every city."[23] However, this solution implicitly assumes that the City Attorney reports to the Mayor. This would be correct for the New York model, where the Mayor appoints the chief legal officer without confirmation, and he or she serves at pleasure. In a city with an elected City Attorney, permitting the Council to employ independent counsel still leaves the executive branch in the same quagmire.

Kimmel is not alone in identifying the potential problems faced by governmental attorneys. The League of California Cities has been working on an ethical code for city attorneys.[24] That code states: "The role of the city attorney and the client city varies. Some city attorneys are full-time public employees appointed by a city council; some are members of a private law firm, who serve under contract at the pleasure of a city council. A few are directly elected by the voters; some are governed by a charter. When reflecting on the following principles, the city attorney should take these variations into account."

One way of dealing with the problem is to assign legal counsel when the elected City Attorney has a conflict of interest. The San Francisco Charter creates such a procedure: "…any elected officer, department head, board or commission may engage counsel other than the City Attorney for legal advice regarding a particular matter where the elected officers department head, board or commission has reason to believe that the City Attorney may have a prohibited financial conflict of interest under California law or a prohibited ethical conflict of interest under the California Rules of Professional Conduct with regard to the matter…." If there is disagreement as to whether such a conflict of interest exists, the San Francisco Charter authorizes a retired judge to settle the problem: "If the retired judge decides that the City Attorney does not have a conflict of interest regarding the particular matter, the City Attorney shall continue to be the legal adviser to the elected officer, department head, board or commission for such matter. If the retired judge decides that the City Attorney has a conflict of interest regarding a particular matter, the elected officer, department head, board or commission shall be entitled to retain outside counsel for legal advice regarding the particular matter, and the City Attorney shall thereupon cease to advise the elected officer, department head board or commission on such matter. Any such finding of a conflict of interest shall not affect the City Attorney's role as legal advisor to the elected officer, department head, board or commission on all other matters."[25]

Besides the problem of defining the client, and assigning outside legal counsel, San Diego's system for electing and empowering also raises serious issues as to who is to control litigation. This issue was an important one in Los Angeles during the 1997-1999 charter reform. Section 42 placed the Council in control of litigation, but there were situations when the Mayor and executive branch agencies seemed to be the more appropriate focus of client decisions. Consequently, voters amended the Charter to define the control of litigation:

"**Sec. 272. Control of Litigation.**

---

[23] Kimmel, p. 1104.

[24] See Ethical Principles for City Attorneys, Adopted October 6, 2005, City Attorneys Department Business Session, at the following URL, accesses on August 22, 2007: www.cacities.org/resource_files/24175.Code%20of%20Ethics%20Final.doc .

[25] Both of these quotes are from the San Francisco Charter, section 6.102.

The civil client of the City Attorney is the municipal corporation, the City of Los Angeles. The City Attorney shall defend the City in litigation, as well as its officers and employees as provided by ordinance. The City Attorney may initiate civil litigation on behalf of the City or the People of the State of California, and shall initiate civil litigation on behalf of the City when requested to do so by the authority having control over the litigation as set forth below. The City Attorney shall manage all litigation of the City, subject to client direction in accordance with this section, and subject to the City Attorney's duty to act in the best interests of the City and to conform to professional and ethical obligations. In the course of litigation, client decisions, including a decision to initiate litigation, shall be made by the Mayor, the Council, or boards of commissioners in accordance with this section. However, the decision to settle litigation shall be made in accordance with Section 273.

(a) **Council.** The Council shall make client decisions in litigation involving matters over which the Charter gives the Council responsibility.

(b) **Mayor.** The Mayor shall make client decisions in litigation involving matters over which the Charter gives the Mayor responsibility.

(c) **Boards.** The boards of the Proprietary Departments, the Ethics Commission, the Board of Fire and Police Pension Commissioners, the Board of Administration of the Los Angeles City Employees Retirement System, and the Board of Administration of the Water and Power Employees Retirement System shall make client decisions in litigation exclusively involving the policies and funds over which the Charter gives those boards control.

(d) **Interpretation of Section.** The City Attorney shall have the authority to make the determination regarding who is authorized to make client decisions on behalf of the City in accordance with the principles of this section and accepted principles of representation of municipal entities.

Sec. 273. Settlement of Litigation.

(a) **Boards.** The boards of the Proprietary Departments, the Ethics Commission, the Board of Fire and Police Pension Commissioners, the Board of Administration of the Los Angeles City Employees Retirement System and the Board of Administration of the Water and Power Employees Retirement System shall have the authority to approve or reject settlement of litigation exclusively involving the policies and funds over which the Charter gives those boards control. The settlement of all other litigation shall be in accordance with subsections (b) and (c) of this section.

(b) Settlements Involving Only Money Damages.

(1) The Mayor shall have authority to approve or reject settlements involving only the payment or receipt of money damages not exceeding an amount set by ordinance, and shall make client decisions with respect to settlement of such litigation. The Mayor may delegate this authority to the City Attorney.

(2) A claims board comprised of the Mayor as chair, the President of the Council and the City Attorney, or their designees, shall have the authority to approve or reject settlement of litigation involving only the payment or receipt of money damages exceeding the amount that is within the Mayor's authority under the preceding subsection, and below an amount set by ordinance. The claims board shall make client decisions with respect to settlement of such litigation.

(3) The Council shall have the authority to approve or reject settlement of litigation that involves only the payment or receipt of money damages exceeding the amount that is within the authority of the claims board under the preceding subsection, subject to veto of the Mayor, and Council override of the Mayor's veto by a two-thirds vote of the Council. The Council shall make client decisions with respect to settlement of such litigation. The claims board shall make recommendations to the Council concerning settlement of litigation within the scope of this subsection.

(c) Other Settlements. The Council shall have the authority to approve or reject settlement of litigation that does not involve only the payment or receipt of money, subject to veto of the Mayor, and Council override of the Mayor's veto by a two-thirds vote of the Council."

Los Angeles' new charter addresses the issue of who is the client and who is to make client decisions, control litigation, and accept settlement offers. This allows the Mayor's Office to make some provisions for risk assessment, and to attempt to save Los Angeles money on costly lawsuits. San Diego's Charter is more problematic today than Los Angeles' Charter was on these issues. Section 40 does not define who is the client and who is to control litigation, as Los Angeles' 1925 Charter did. This could present serious problems for the City of San Diego. Should the Subcommittee decide to amend Charter section 40, these are at least a few of the issues that may need to be addressed.

Other Cities' Charters

New York City Charter[26]

§ 391. **Department; corporation counsel.** There shall be a law department the head of which shall be the corporation counsel.

§ 392. **Assistants.** a. The corporation counsel may appoint a first assistant corporation counsel and such other assistants as may be necessary within the appropriation therefor.

b. The first assistant corporation counsel shall, during the absence or disability of the corporation counsel, possess all the powers and perform all the duties of the corporation counsel and in case of the death or the corporation counsel or of a vacancy in that office shall act as corporation counsel until the appointment and qualification of a corporation counsel.

c. Any assistant shall, in addition to the duties regularly assigned to him or her, possess such of the powers and perform such of the duties of the corporation counsel as the corporation counsel shall empower such assistant to exercise by written authority filed and remaining on record in the department.

§ 393. **Offices.** The corporation counsel may maintain an office in each of the boroughs or any of them.

§ 394. **Powers and duties.** a. Except as otherwise provided in this chapter or other law, the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested.

b. Except as otherwise provided in this chapter or other law, the corporation counsel shall have charge and conduct of the legal proceedings necessary in opening, widening, altering and closing streets and in acquiring real estate or interests therein for the city by condemnation proceedings, and the preparation of all leases, deeds, contracts, bonds, and other legal papers of the city, or of or connected with any agency or officer thereof, and the corporation counsel shall approve as to form all such deeds and bonds and, individually or by standard type of class, all contracts, leases and other legal papers.

---

[26] In New York City, the Corporation Counsel is appointed by, and serves at Mayor's pleasure. See http://www.nyc.gov/html/law/html/about/about.shtml.

c. Except as otherwise provided in this chapter or other law, the corporation counsel shall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties or to enforce the laws. The corporation counsel shall not be empowered to compromise, settle or adjust any rights, claims, demands, or causes of action in favor of or against the city, and shall not permit, offer or confess judgment against the city, or accept any offer of judgment in favor of the city without the previous approval of the comptroller, except that with regard to matters involving excise and non-property taxes, such previous written approval shall be obtained from the finance administrator; provided, however, that this inhibition shall not operate to limit or abridge the discretion of the corporation counsel in regard to the proper conduct of the trial of any action or proceeding or to deprive such corporation counsel of the powers and privileges ordinarily exercised in the courts of litigation by attorneys-at-law when acting for private clients.

§ 395. **Legal service to agencies.** The corporation counsel may assign an assistant or assistants to any agency. The head of each agency, within appropriations for such purpose, may employ staff counsel to assist in the legal affairs of the agency. No officer or agency, except as provided in this chapter or otherwise especially provided, shall have or employ any attorney or counsel, except where a judgment or order in an action or proceeding may affect such officer or agency individually or may be followed by a motion to commit for contempt of court, in which case such officer or agency may employ and be represented by attorney or counsel at their own expense.

§ 396. **Actions and proceedings for recovery of penalties.** All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law.

§ 397. **Delegation of legal authority.** a. The mayor may delegate to any agency, after consultation with the corporation counsel and the head of the agency, responsibility for the conduct of routine legal affairs of the agency subject to standards, policies, and guidelines of the corporation counsel, and consistent with city-wide controls and uniformity. The mayor may transfer or assign attorneys from the law department to the agency to assist in the conduct of such delegated functions. The corporation counsel shall monitor and evaluate on a regular and continuous basis the exercise of authority delegated pursuant to this section and the mayor, on recommendation of the corporation counsel, may suspend or withdraw any delegated authority whenever in his or her judgment the interests of the city justify such action.

b. Nothing contained in this section shall abrogate the authority of the corporation counsel as attorney and counsel for the city and every agency of the city.

§ 398. **Ex parte administrative warrants.** If entry to a location or premises to be inspected pursuant to an agency's powers and duties is not gained on consent, or if circumstances call for entry without prior notice, the commissioner of such agency, or his or her authorized representative, may request the corporation counsel to make an application, ex parte, in any court of competent jurisdiction for an order directing the entry and inspection of such premises or location and, in accordance with applicable law, to abate any nuisance thereon. Nothing in this section shall be

construed to limit, abridge, affect or amend the power of an agency under law, including state, local or case law, to enter and inspect any location or premises or abate any nuisance thereon, either with or without a warrant, to carry out any of its functions, powers and duties.

Philadelphia Charter

Section 3-203
City Solicitor
The Mayor, with the advice and consent of a majority of all the members of the Council, shall appoint the City Solicitor.

Section 3-101
Department Heads.
Each department shall have as its head an officer who is either personally or by a duly authorized agent or employee of the department, and subject at all times to the provisions of this charter, shall exercise the powers and perform the duties vested in and imposed upon the department.
The following officers shall be the heads of the departments following their respective titles:
City Solicitor, of the Law Department;
###

Section 3-102
The Mayor's Cabinet.
The Mayor's Cabinet shall consist of the mayor, the Managing Director, the Director of Finance, the City Solicitor and the City Representative.

Section 4-400
Functions.
The Law Department shall have the power and its duty shall be to perform the following functions:
Legal Advice. It shall furnish legal advice to the Mayor, to the Council and to all officers, departments, boards and commissions concerning any matter or thing arising in connection with the exercise of their official powers or performance of their official duties and except as otherwise expressly provided, shall supervise, direct and control all of the law work of the City.
Litigation. The Department shall collect by suit or otherwise all debts, taxes and accounts due the City which shall be placed with it for collection by any officer, department, board or commission, and it shall represent the City and every officer, department, board or commission in all litigation. It shall keep a proper docket, or dockets, duly indexed, in which it shall make and preserve memoranda of all such claims, showing whether they are in litigation and their nature and status.
Contracts and Bonds. The Department shall prepare or approve all contracts, bonds and other instruments in writing in which the City is concerned, and shall approve all surety bonds required to be given for the protection of the City. It shall keep a proper registry of all such contracts, bonds and instruments.
Investigation and Law Enforcement. With the approval of the Mayor, the Department shall investigate any violation or alleged violation within the City of the statutes of the Commonwealth of Pennsylvania or the ordinances of the City which may come to its notice, and shall take such steps and adopt such means as may be reasonably necessary to enforce within the City such statutes and ordinances.

Drafting and Codification of Ordinances. Upon request of the Council or of any councilman, or of the Mayor, the Department shall prepare or assist in preparing any ordinance for introduction into the Council, and within two years after the effective date of this charter, it shall prepare and submit to the Council for its consideration, a comprehensive revision and codification of all the general ordinances of the City which are still in effect.

Section 4-401
Access to Records.
The City Solicitor shall have the right of access at all times to the records of any officer, department, board or commission of the City.

Chicago “Charter”

Illinois Code, Chapter 65. Municipalities, Revised Cities And Villages Act Of 1941, Article 21. Optional -- City Of Chicago, City Officers:

§ 65 ILCS 20/21-11. Corporation counsel
Sec. 21-11. Corporation counsel. The head of the law department of the city shall be the corporation counsel. The corporation counsel shall be and act as the legal adviser of the city council and of the several officers, boards and departments of the city. He shall appear for and protect the rights and interests of the city in all actions, suits, and proceedings brought by or against it or any city officer, board or department, including actions for damages when brought against such officer in his official capacity; provided, however, that when an officer or employee of the city is sued personally, even if the cause of action arose out of his official duties, the corporation counsel shall appear for such officer or employee only in case the city council directs him to do so.

Illinois Code, Chapter 65. Municipalities, Illinois Municipal Code, Article 3.1. Officers, Division 20. Elected City Officers:

§ 65 ILCS 5/3.1-20-40. Other officers; election rather than appointment
Sec. 3.1-20-40. Other officers; election rather than appointment. Instead of providing for the appointment of the following officers as provided in Section 3.1-30-5 [65 ILCS 5/3.1-30-5], the city council, in its discretion, may provide by ordinance passed by a two-thirds vote of all the aldermen elected for the election by the electors of the city of a city collector, a city marshal, a city superintendent of streets, a corporation counsel**,** a city comptroller, or any of them, and any other officers which the city council considers necessary or expedient. By ordinance or resolution, to take effect at the end of the current fiscal year, the city council, by a like vote, may discontinue any office so created and devolve the duties of that office on any other city officer. After discontinuance of an office, no officer filling that office before its discontinuance shall have any claim against the city for salary alleged to accrue after the date of discontinuance.

Attachment A

Rules of Professional Conduct of the State Bar of California.

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) (Amended by order of Supreme Court; operative September 14, 1992; operative March 3, 2003.)

###

Rule 3-600. Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members.

Discussion:

Rule 3-600 is not intended to enmesh members in the intricacies of the entity and aggregate theories of partnership.

Rule 3-600 is not intended to prohibit members from representing both an organization and other parties connected with it, as for instance (as simply one example) in establishing employee benefit packages for closely held corporations or professional partnerships.

Rule 3-600 is not intended to create or to validate artificial distinctions between entities and their officers, employees, or members, nor is it the purpose of the rule to deny the existence or importance of such formal distinctions. In dealing with a close corporation or small association, members commonly perform professional engagements for both the organization and its major constituents. When a change in control occurs or is threatened, members are faced with complex decisions involving personal and institutional relationships and loyalties and have frequently had difficulty in perceiving their correct duty. (See *People ex rel Deukmejian v. Brown* (1981) 29 Cal.3d 150 [172 Cal.Rptr. 478]; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614 [120 Cal.Rptr. 253]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *In re Banks* (1978) 283 Ore. 459 [584 P.2d 284]; 1 A.L.R.4th 1105.) In resolving such multiple relationships, members must rely on case law.